86-427

Supreme Court, U.S.
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CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLYDE L. BUTLER,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REBECCA L. HUDSMITH
Council of Record
JACK & HUDSMITH
101 Milam Street
Shreveport, LA 71101
(318) 227-9637
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER THE MERIT SYSTEMS PROTECTION BOARD MUST, CONSISTENT WITH THE POLICY OF THE FEDERAL CIVIL SERVICE LAWS TO PROVIDE FULL RELIEF TO A WRONGFULLY DISCHARGED FEDERAL EMPLOYEE, INSURE COMPLIANCE WITH ITS REINSTATEMENT WITH A DEMOTION ORDER BY REQUIRING THE EMPLOYING AGENCY TO RETURN THE REINSTATED BUT DEMOTED EMPLOYEE TO HIS PRE-DISCHARGE DUTY STATION.

PARTIES TO PROCEEDINGS

The parties to the proceedings below were the petitioner, Clyde L. Butler, and the respondent, the Department of Agriculture.

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No._____

IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1986

CLYDE L. BUTLER,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, CLYDE L. BUTLER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Federal Circuit affirming the Merit Systems Protection Board ("MSPB" or "Board") decision finding the Department of Agriculture ("agency") in compliance with the Board's earlier order to reinstate but demote Petitioner.

OPINIONS BELOW

The per curiam decision of the United States Court of Appeals for the Federal Circuit appears in the Appendix (App.") at la. The addendum decision of Presiding Official Walter Orr, which ultimately became the decision of the Board, and which addressed the issue of compliance with the Board's earlier order to reinstate Petitioner with a demotion appears in the App. at 9a.

JURISDICTION OF THE COURT

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

5 U.S.C.§ 1205 provides in part:

> (a) The Merit Systems Protection Board shall--
>
> > (2) order any Federal agency or employee to comply with any order or decision issued by the Board . . . and enforce compliance with any such order.

STATEMENT OF THE CASE

Petitioner CLYDE L. BUTLER was involuntarily terminated by the Department of Agriculture Soil Conservation Service ("agency"), effective October 19, 1984, from his position as party leader soil scientist, GS-11 step 7. Following petitioner's appeal of his termination to the Merit Systems Protection Board ("MSPB" or "Board"), Presiding Official Walter Orr issued an initial decision on February 27, 1985, in which he ordered that the termination action be cancelled and that the agency substitute instead a thirty-day suspension and a demotion from GS-11 to GS-9. This decision became the final decision of the Board on April 2, 1985. By letter dated March 19, 1985, the agency informed petitioner that, effective April 2, 1985, he would be reassigned as a soil scientist to the Covington, Louisiana Soil Survey Office,

some 244 miles from his duty station prior to his wrongful involuntary termination. Additionally, the agency stated it would demote petitioner to a GS-9, Step 1.

On April 1, 1985, in response to the March 19, 1985, agency action, petitioner filed a petition with the Board for enforcement of its April 2, 1985 Final Decision. The presiding official ordered a compliance hearing for May 9, 1985, at which the agency presented the testimony of one witness, the state soil scientist who made the decision to assign petitioner to Covington. From this testimony, the Presiding Official found:

> (1) The state soil scientist has twenty-two soil scientist positions under his supervision;
>
> (2) The only vacancy in these twenty-two positions existing prior to petitioner's reinstatement was a position with the Covington, Louisiana Soil Survey Office;

(3) The state soil scientist decided to leave this vacancy open pending petitioner's appeal of his discharge, in the event that petitioner was ultimately reinstated;

(4) The placement of petitioner on a soil survey team in the vicinity of his previous duty station would have resulted in the displacement of another soil scientist and involuntary reassignment of that employee to Covington.

App. at 13a-15a. The testimony of the state soil scientist also established that:

(1) Prior to his wrongful discharge, petitioner had been scheduled to assume the supervisory position of party leader of the team of soil scientists who were to conduct the soil survey of Sabine Parish;

(2) The Sabine Parish survey was late getting started and had to proceed on a compressed schedule;

(3) The Covington soil survey team had managed to stay ahead of schedule despite the soil scientist vacancy which had existed since April of 1984 as the result of the agency's transfer of one soil scientist on the team;

(4) The agency considered that the Covington vacancy could remain unfilled for more than a year without defeating the long-term mapping goals established by the agency.

Significantly, no evidence was presented at the compliance hearing to support that, had petitioner been demoted rather than discharged in October of 1984, he would have been assigned to any survey team other than Sabine Parish. The presiding official did not make any finding to this effect.

On May 30, 1985, Presiding Official Orr issued an addendum decision in which he found that the agency's reinstatement of petitioner to the Covington, Louisiana Soil Survey Office constituted compliance with the Board's earlier order to

reinstate but demote petitioner. App. at 9a-17a.

By Order dated October 22, 1985, the Board denied petitioner's petition for review of the addendum decision, finding it did not meet the Board's criteria for review. App. at 18a. The Board also indicated that, as a matter of law, petitioner was not entitled to be reinstated to the position he would have been in but for his wrongful termination. App. at 18a-19a.

On appeal, the United States Court of Appeals for the Federal Circuit affirmed the Board's finding of compliance. App. at 1a-8a. The court concluded that the agency was only required to reinstate petitioner to a position with actual duties and responsibilities the same or substantially equivalent in scope and status to the duties and

responsibilities held prior to the wrongful discharge, citing to Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). App. at 5a. Thus, according to the reasoning of the court, petitioner's reinstatement to a soil scientist position some 244 miles from his pre-discharge duty station constituted compliance since soil survey positions are migrant in nature and mobility is a condition of a soil scientist's employment. App. at 7a-8a.

REASONS FOR GRANTING THE WRIT

THE MERIT SYSTEMS PROTECTION BOARD, THE BODY HAVING JURISDICTION OVER THE ENFORCEMENT OF THE POLICIES OF THE FEDERAL CIVIL SERVICE LAWS, IS NOT ENFORCING THE POLICY OF PROVIDING FULL RELIEF TO A WRONGFULLY DISCHARGED FEDERAL EMPLOYEE BY REQUIRING THE EMPLOYING AGENCY TO RETURN THE REINSTATED BUT DEMOTED EMPLOYEE TO HIS PRE-DISCHARGE DUTY STATION

Federal civil servants are protected by an elaborate, comprehensive scheme forbidding arbitrary action by supervisors and providing procedures--administrative and judicial--by which improper action may be redressed. See 5 U.S.C. §§ 7511-7513, 7701-7703. This comprehensive scheme has been interpreted to provide meaningful remedies for employees who may have been unfairly disciplined or wrongfully discharged, including reinstatement and full backpay.

Bush v. Lucas, 462 U.S. 367, 386-88, 103 S.Ct. 2404, 2415-16 (1983). Congress intended that these remedies would put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place. See S.Rep. No. 1062, 89th Cong., 2d Sess., 1 (1966), U.S. Code Cong. & Admin. News 1966, p. 2097. As the result of Congressional intent to provide full relief, this Court has refused to create a nonstatutory damages remedy for federal employees who are wrongfully discharged. Bush v. Lucas, 462 U.S. at 386-88, 103 S.Ct. at 2415-16. See also Premachandra v. United States, 739 F.2d 392 (8th Cir. 1984).

As this Court has stated in the context of a National Labor Relations Board Case, the basic purpose of a reinstatement or back pay order is "restoration of the situation, as nearly

as possible, to that which would have obtained but for the illegal discrimination." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 852 (1941). The same rationale should apply in the context of a federal civil servant who was wrongfully discharged by a federal agency and who should have, instead, been demoted. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984).

In enforcing compliance with its reinstatement orders, the Merit Systems Protection Board must, consistent with the policy of the federal civil service laws to provide full relief to a wrongfully discharged employee, require that the agency reinstate the employee to the duty station to which he would have been assigned had he not been wrongfully discharged. See 5 U.S.C. § 1205 (a)(2). Nevertheless, the Board simply requires

that the agency reinstate the wrongfully discharged employee to actual duties and responsibilities which are substantially equivalent in scope and status to his previous duties. Kerr, 726 F.2d at 733.

In the present case, the Board did not require the agency to reinstate petitioner to a soil scientist position with the Sabine Parish Soil Survey Team, even though Sabine Parish would have been petitioner's duty station had he not been wrongfully discharged, the Sabine Parish soil survey was behind schedule and the one to which petitioner was reinstated some distance away was ahead of schedule, and the assignment of petitioner to the Sabine Parish Soil Survey team would have required, at most, the reassignment of another soil scientist to Covington. Under these circumstances, the Board's failure to require the agency to reinstate petitioner to Sabine Parish is

inconsistent with the policy of the federal civil service laws to accord federal employees full relief and should be reviewed by this Court with a view to conforming Board remedial practice with federal remedial policy.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States court of Appeals for the Federal Circuit.

Respectfully submitted,

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United States Court of Appeals for the

Federal Circuit

CLYDE L. BUTLER,	)	
	)	
Petitioner,	)	Appeal No. 86-784
	)	
v.	)	MSPB Docket No.
	)	DA07528510070-COMP
DEPARTMENT OF AGRICULTURE,	)	
	)	
	)	
Respondent.	)	

DECIDED: June 16, 1986

Before Bissell, Circuit Judge, COWEN, Senior Circuit Judge, and ARCHER, Circuit Judge.

PER CURIAM.

DECISION

The Merit Systems Protection Board (MSPB or Board) decision finding the Department of Agriculture (agency) in compliance with the Board's earlier order to reinstate but demote petitioner, is affirmed.

OPINION

I.

On October 19, 1984, the agency removed petitioner from his GS-11 position as leader of a soil survey team in Natchitoches Parish, Louisiana, for misconduct and unacceptable performance. On appeal to the MSPB, the presiding official sustained only one of the misconduct charges, and only part of the charge that petitioner's performance was unsatisfactory. In considering the appropriateness of the penalty, the presiding official reversed the agency's decision to remove petitioner, ordered the agency to reinstate petitioner, and substitute as penalty, a 30-day suspension and a demotion to a GS-9 position.

Subsequently, the agency notified petitioner that it would reinstate him, suspend him for 30 days, demote him to a

GS-9 position, and assign him to the soil survey team operating out of the Covington Soil Survey Office. Petitioner filed a petition with the MSPB seeking enforcement of the order and challenging the agency's reinstatement and assignment because the position with the Covington Soil Survey Office is 244 miles from his previous duty station. The presiding official found, however, that the agency was in full compliance with the reinstatement order, and the Board denied petitioner's request for the review of the decision.[1]

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[1] Before the MSPB, petitioner challenged the agency's decision to place him in step 1 of grade GS-9, rather than in step 6, the level he had attained prior to his promiton to the GS-11 position. The presiding official found that the agency was in compliance in demoting petitioner to step 1 of grade GS-9, and petitioner has not challenged that decision in his petition to this court.

II.

Relying on Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984), petitioner argues that the MSPB erred in finding that the agency had complied with the reinstatement and demotion order, because the agency had not placed him as nearly as possible in the status quo ante. He contends that the agency should have offered him a position on his former soil survey team, or with the team to which he would have been promoted. We disagree.

Although the Board generally lacks jurisdiction over reassignment actions, 5 U.S.C. § 2302(a), we held in Kerr that the MSPB has authority to order corrective action in cases in which an agency has failed to comply with an earlier order of the Board. Kerr, 726 F.2d at 733. We stated further that the purpose

of an order directing an agency to reinstate a wrongfully discharged employee is to place that employee as nearly as possible in the status quo ante. Id. Although we adhere to the general principles stated, we recognize that Kerr is of limited applicability to the instant case.

In Kerr, the MSPB had ordered complete reinstatement of a wrongfully discharged employee. We intimated that the Board should require strict compliance with that order and stated that the Board, where appropriate, "should make a substantive assessment of whether the actual duties and responsibilities to which the employee was returned are either the same or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge." Kerr, 726 F.2d at 733. In the instant case, the Board

ordered reinstatement coupled with a demotion, modifying the agency's penalty of removal for misconduct and unsatisfactory performance. The agency was not required to restore petitioner to his former GS-11 position, because the MSPB had ordered his demotion to grade GS-9. All that was required of the agency in the hearing before the MSPB was to establish that it had, in good faith, placed petitioner in a GS-9 position having substantially the same duties and responsiblities as the position he would have occupied had the agency demoted him in the first instance to a grade GS-9 position instead of removing him.

The presiding official found that the Covington position to which the agency assigned petitioner was the only vacancy for a GS-9 soil scientist, and that the agency had gone to considerable effort to hold that position open for

petitioner. The presiding official also found that the placement of petitioner on any other survey team would have resulted in the displacement of another employee through involuntary reassignment of that employee to the Covington office. The presiding official noted that the Covington assignment was a permanent position which would require utilization of petitioner's services as a soil scientist until 1990.

Petitioner's principal complaint is that the Covington assignment was to a location 244 miles from his previous duty station, and that this action constituted noncompliance with the order of the MSPB. However, the testimony of the agency official, which the presiding official found to be highly credible and unrebutted by any probative evidence of the petitioner, established that soil survey positions are migrant in nature; that it

is necessary for soil scientists to be willing to move a great deal, and that mobility is a condition of employment for team members. In view of this evidence, we cannot agree that petitioner's assignment to a station a considerable distance from his prior duty station was a violation of the MSPB reinstatement order or is contrary to our decision in Kerr.

We conclude that the findings of the presiding official, which were sustained by the full Board, are supported by substantial evidence; that the MSPB correctly concluded that the agency had complied with the order of reinstatement, and that the petitioner's assignment was not an effort to secure his removal or to avoid compliance with the Board's order.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

Clyde L. Butler, Appellant,	)	
v.	)	Docket No. DAO0528510070-COMP
Department of Agriculture,	)	Date: May 30, 1985
Agency.	)	

Before
Walter Orr, Presiding Official

ADDENDUM DECISION

Appellant filed a petition for enforcement of the Board's Decision, dated February 27, 1985, which reversed his removal from the Department of Agriculture's Soil Conservation Service. That decision became final on April 2, 1985. See 5 C.F.R. § 1201.113 (1985). The agency's action is found to constitute compliance.

The agency was required to substitute for the removal action a suspension for thirty days, and demote appellant from GS-11 to GS-9. In an effort to comply with the Board's decision, the agency cancelled the removal action effective October 19, 1984, and changed appellant to a lower grade from GS-11 step 7, to GS-9 step 1, effective October 20, 1984. On March 18, 1985, appellant was returned to duty effective November 19, 1984, and reassigned to the Covington Louisiana Soil Survey Office. (Agency Response - Proof of Compliance, Exh. A-D).

Appellant complains the agency has not complied because his demotion to GS-9 should have been adjusted to pay step 6, his step prior to promotion to GS-11, rather than pay step 1, and because his reassignment upon restoration to duty is 244 miles from his old duty station and

does not return him to the status quo ante, as required by Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). Appellant argues that pay adjustment to GS-9 step 6, is required by the initial decision at page 12, where the presiding official states, "that demotion . . . might well restore appellant to his former level of performance." Appellant's reliance on this statement is misplaced, however, because the statement merely reflects consideration of the penalty under Douglas v. Veterans Administration, 5 MSPB 313 (1981), in light of the agency's failure to consider demotion in lieu of removal as required in Brewster v. Department of the Navy, 2 MSPB 547 (1981). (See Initial Decision, page 9). Thus, I find no lack of compliance in appellant's demotion to GS-9, step 1. No adjustment of appellant's pay above step 1 was

required by the initial decision, and appellant has provided no legal authority that such adjustment is otherwise required.

On the issue of his reassignment, */ appellant relies on Wright v. Department of Transportation, 24 M.S.P.R. 550 (1984), for the proposition that "reassignment of appellant after Board order of reinstatement evidenced failure of agency to comply with Board's order and was an effort to cause appellant's

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*/ Although the Board lacks jurisdiction over reassignment actions per se see Kelterer v. Department of Agriculture, 2 MSPB 459, 461 (1980), the Board under Kerr, must assure compliance with its orders. Cofield v. Government Printing Office, MSPB Docket No. DC07528110599-COMP. (August 10, 1984).

removal." (Petition of Appellant for Enforcement of Final Decision, page 3.) Appellant, however, incorrectly states the Board's holding in Wright. The Board did not hold that reassignment after a reinstatement order per se evidences lack of compliance. Rather, the Board treated the issue as a question of fact, finding that because Wright "was never assigned a permanent position with meaningful duties," the agency had failed to comply with the Board's reinstatement order. Id. at 554. Because the issue is a question of fact, appellant in the case was afforded a hearing on the issue of his reassignment.

At the hearing the agency produced testimony from Arvill Touchet, State Soil Scientist, that he made the decision to assign appellant to the Covington, Louisiana survey team. Touchet testified that as the supervisor for the Louisiana

soil survey, he had twenty-two soil scientist positions under his supervision. Only a single vacancy existed of these twenty-two positions, the position at Covington to which appellant was assigned. Touchet explained that the position had become vacant due to the loss of a member prior to appellant's removal. Due to the heavy workload projected for that survey as reflected in the "Soil Survey Work Load Analysis" of September 30, 1984, (Agency Exhibit 1) Touchet decided to fill that vacancy by hiring and training a new soil scientist. However, that action was deferred until completion of appellant's appeal to protect the agency from a potential reduction in force in the event of appellant's reinstatement. Touchet further elaborated that appellant could not be restored to his old GS-11 supervisory position, and that because no

other vacant GS-9 positions existed, placement of appellant on any other survey team would result in displacement of a GS-9 employee and involuntary reassignment of that employee to the Covington survey.

Touchet's testimony is highly credible and is unrebutted by any probative evidence from appellant. Unlike the agency's action in Wright, appellant's reassignment in this case is to a permanent position which according to both the testimony of Touchet and the "Soil Survey Work Load Analysis," will require utilization of appellant's services as a soil scientist at Covington until the year 1990. Therefore, I find appellant's reassignment was not an effort to secure appellant's removal or to otherwise avoid compliance with the Board's reinstatement order. The petition for enforcement is DISMISSED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§ 1201.114-.115 (1985). The petition for review must be filed on or before July 4, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

This initial decision will become a final decision of the Board on July 4, 1985, unless a petition for review is filed by that date or the Board reopens

the case on its own motion. 5 C.F.R. §§ 1201.113, .117 (1985).

Any appellant adversely affected or aggrieved by a final decision of the Board may, if the court has jurisdiction, obtain judicial review of that decision by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be received by the Court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

WALTER ORR
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CLYDE L. BUTLER, appellant,	)	DOCKET NUMBER DA07528510070 COMP
v.	)	DATE: OCT. 22,1985
DEPARTMENT OF AGRICULTURE, agency.	)	

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

ORDER

Having considered the appellant's petition for review of the addendum initial decision issued on May 30, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition. */

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*/ The portion of Kerr v. National Endowment for the Arts, 726 F.2d 730, 733 (1984), which the appellant cites in his

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days

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petition is not applicable to this case, since the presiding official ordered the agency to substitute a demotion for the appellant's removal.

after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.